IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON: 13.11.2017

ORDER PRONOUNCED ON: 13.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

Application No.282 of 2007
in IP No.42 of 2007

1. R.Jayachandran
2. Dasarathan
3. M.Janarthana Naidu ... Applicants/ Unsecured Creditors

Vs.

1. T.A.Kalifuliah ... Respondent/Insolvent

2. The Office of the Official Assignee
   High Court – Madras. ... Respondent

3. T.A.Haji Abdul Salam ... Respondent

Prayer: Petition filed under Sections 51 to 55 of the Presidency Towns Insolvency Act, 1909, prays for directing the Official Assignee to takes steps to set aside the sale dated 05.03.2007 registered as document No.626 and 627 of 2007 in the Sub Registrar Office, Poonamallee, Chennai, and bring the property for public auction for the benefit of creditors.;

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For Applicants : Mr.V.Karthikeyan
Mr.C.Ramesh, for R2/Official Assignee

For Respondents : Mr.V.Sivakumar for R1/Insolvent
Mr.R.Munusamy for R3

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O R D E R

Insolvency Petition No.42 of 2007 is a Debtor's petition filed by the 1st respondent herein seeking to adjudicate himself as an insolvent. The said petition was filed on 11.04.2007 and an order of adjudication came to be passed on 26.04.2007. The assets of the insolvent were directed to vest in the Official Assignee, who is administering the estate. During the course of the administration of the estate of the insolvent, it was discovered that the insolvent had sold two items of properties under two sale deeds in favour of the 3rd respondent. The said sale deeds have been executed on 05.03.2007, i.e. within a period of two years prior to the insolvency proceeding, the said sale deeds are sought to be set aside by the Official Assignee. Some of the unsecured creditors of the insolvent have also filed an application in Application No.282 of 2007 seeking a direction to the Official Assignee to set aside the sale.

2. The Official Assignee has also filed a report to which the 3rd respondent who is a purchaser has filed a counter affidavit. In the report of the Official Assignee dated 28.04.2008 seeking to set aside the sales in favour of the 3rd respondent invoking the powers of the Insolvency Court under Section 55 of the Presidency Towns Insolvency Act, it is stated as follows. The 1st defendant T.A.Kalifuliah has been adjudicated as an

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insolvent on his own petition by an order dated 26.04.2007 in IP No.42 of 2007. He has disclosed House Hold Articles worth about Rs.10,000/- as assets. He has disclosed 123 creditors and the total debt outstanding was shown as Rs.1,12,26,286.35. It is stated that on 05.03.2007, the said debtor has sold his properties in favour of the 3rd respondent, the transfers are made within 36 days prior to the date of the filing of Insolvency Petition, viz. 11.04.2007. It is also claimed that the 3rd respondent is the brother of insolvent.

3. According to the Official Assignee, the properties sold under the two sale deeds dated 05.03.2007, on worth more than the value reflected in the sale deeds and sale deeds have been executed with a view to screen away the properties from the creditors of the insolvent. It is further stated that the value of the property according to the valuer appointed by the Official Assignee are about Rs.90,20,000/- and Rs,5,09,000/- respectively. But the said properties have been sold for a consideration of Rs.45,00,000/- and Rs.1,00,000/- under the sale deeds dated 05.03.2007, registered as document Nos.626 and 627 of 2007. The Official Assignee would further point out that the properties were situate in prime location in Poonamallee Town. It is also submitted that the 3rd respondent has been carrying on business in the adjacent premises and that he was aware of the indigent circumstances of the 1st respondent the debtor.

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4. The 3rd respondent in his counter affidavit would submit that the 1st respondent had in fact borrowed monies from State Bank of India, which had taken action under the *SARFAESI* Act, for realisation of its dues, the possession notice was issued by the Bank on 16.09.2006 and the same was published in 'Daily Thanthi' Newspaper dated 24.09.2006. The 1st respondent had in fact published advertisements offering to sell the properties situate at Bangalore Trunk Road, Poonamallee as well as Pillayar Koil Street, Poonamallee on 17.09.2006 and 23.09.2006. The 3rd respondent would also state that the 1st respondent had challenged the proceedings initiated by the Bank under the *SARFAESI* Act, had obtained the conditional order of stay of the auction sale. It is also averred that the Debt Recovery Tribunal had granted an interim order of stay on condition the 1st respondent paid a sum of Rs.4,00,000/-. It is claimed by the 3rd respondent that he paid a sum of Rs.4,00,000/- in order to enable the 1st respondent to comply with the conditional order of the Debt Recovery Tribunal. Under such complying circumstances the 1st respondent had offered the property for sale and the 3rd respondent purchased the said properties only with view to aver the public auction sale under the *SARFAESI* Act.

5. The 3rd respondent would further claim that he was a *bona fide*

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purchaser for value without notice of the indigent circumstances of the 1st respondent. Though, the relationship between the 1st and 3rd respondent is admitted, it is claimed that after the partition of the properties between them, they are not in talking terms. On the above contentions the 3rd respondent sought for dismissal of the application.

6. Though, the prayer in the Application No.282 of 2007 is only for direction to the Official Assignee to take steps to set aside the sale, in view of the fact that the Official Assignee has filed a report in the said application itself seeking a declaration that the sale of the properties by the 1st respondent on 05.03.2007 are null and void and to direct the vesting of the properties in the Official Assignee are being proceeded with under the Presidency Towns Insolvency Act. And in view of the fact that evidence has been recorded in this application itself this Application No.282 of 2007 is treated as an application under Section 55 of the Presidency Towns Insolvency Act.

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7. On the completion of the pleadings, the learned Master has recorded evidence. The 1st applicant R.Jayachandran has been examined as P.W.1 and a registered valuer the name S.V.N.Natarajan has been examined as P.W.2. One A.Govindaraju, an assistant of M.Sappani Pillai, an

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approved valuer has been examined as R.W.1, Mr.M.Ajeez Mohideen another valuer has been examined as R.W.2 on behalf of the 3rd respondent and the 3rd respondent has been himself examined as R.W.3. The valuation reports of the valuers have been marked as Exs.P3, R2, R3, R4 and R24. While Exs.P1 to P3 have been marked on the side of the applicant/Official Assignee, Exs.R1 to R27 have been produced by the 3rd respondent.

8. On the above pleadings, the following issues arise for determination in this application;

1. Whether the sale of the properties on 05.03.2007 by the insolvent were with an intention to defeat the creditors?

2. Whether the 3rd respondent is a bona fide purchaser for value without notice of the indigent circumstances of the 3rd respondent?

9. **On the issues**:- Section 55 of the Presidency Towns Insolvency Act reads as follows:

"**Section 55. Avoidance of voluntary transfer**:-

Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years

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after the date of the transfer be avoid against the Official Assignee"

10. The fact that the transfer is made within two years prior to the order of adjudication is not in dispute. It is also not in dispute that the transfer is not one made before and in consideration of marriage. Therefore, the only question that remains is whether the purchaser, viz., the 3rd respondent is a purchaser in good faith and for valuable consideration.

11. The sole ground on which the Official Assignee would seek to have the transfers declared void is on the basis of the valuation. According to Mr.C.Ramesh, learned counsel appearing for the Official Assignee as per Ex.R2 and R3, the valuation reports of the valuer engaged by the Official Assignee, the property situate in Bangalore Trunk Road, Poonamalle is valued at Rs.90,20,000/- and the property situate at Pillayar Koil Street, Poonamallee measuring about 258 sq. ft. is valued at Rs.5,09,000/-. As per the valuation report of Mr.S.V.N.Natarajan, a registered valuer engaged by the applicants in application in Application No.282 of 2007 the valuation of the property situate at Chennai Bangalore Trunk Road, Poonamallee is about Rs.73,45,536/-. The valuer engaged by the Official Assignee has not made himself available for Cross-examination. Its only his assistant one

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A.Govindaraju, who has deposed on his behalf, but it is seen from the evidence that he has not deposed anything apart from producing the valuation report of Mr.Sappani Pillai. The said witness who was examined as R.W.1 had in his Cross-examination stated that he has not submitted any document to show that a request was made by the Official Assignee for valuation of the property. The evidence of the said A.Govindaraju is only with reference to the valuation of the property. He has not spoken anything about the payment of consideration for the sale deeds dated 05.03.2007. Similarly Mr.S.V.N.Natarajan, the other approved valuer who has been examined as P.W.2 has valued the property as on 20.07.2007, whereas the sale of the property by the 1st respondent in favour of the 3rd respondent took place on 05.03.2007. Mr.Ajeez Mohideen, who is also a chartered valuer has filed a report stating that the value of the property at Chennai Bangalore Trunk Road was Rs.41,83,335/- as on 05.03.2007 and the property at Pillayar Koil Street which is about Rs.1,81,374/- as on 05.03.2007. However Mr.Ajeez Mohideen had in his Cross-examination admitted that he had gone by the valuation reflected in the sale deeds dated 05.03.2007.

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12. The burden of proving that the transfer was not in good faith and the purchaser was not a *bona fide* purchaser is undoubtedly on the Official

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Assignee, in view of the decisions of this Court of the Privy Council in ***Official Assignee of the Estate of Cheah Soo Tuan v. Khoo Saw Cheow,*** reported in ***AIR 1930 (PC) 265; Official Receiver v. P.L.K.M.R.M.Chettyar Firm,*** reported in ***1931 AIR (PC) 75*** and ***Harry Pope v. Official Assignee, Rangoon*** *reported in* ***1934 AIR (PC) 3.*** The Hon'ble Supreme Court also ***N.Subramania Iyer v. Official Reciever, Quilon and another,*** *reported in* ***AIR 1958 SC 1***, after considering the decisions of the Privy Council referred to supra as well as the effect of Section 55 of the Presidency Towns Insolvency Act had observed as follows:

> "*These three decisions of the Judicial Committe settled the law in this country contrary to what had been the consensus of Judicial opinion previously, that the initial burden of proving that the transaction impeached had not been made in good faith and for valuable consideration lies on the party seeking to set aside the transaction. The learned counsel for the respondent was not able to adduce any reasons to the contrary and it must therefore be taken that it is settled law in Insolvency proceedings that the burden of proof lies on the Official Assignee or Receiver who challenges the transaction".*

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13. In the case on hand, as already pointed out, except the evidence of the assistant of the valuer, there is no evidence let in on the side of the Official Assignee. However, the 1st petitioner in Application No.282 of 2007, R.Jayachandran has been examined as P.W.1, he had filed a proof affidavit

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stating that the 1st respondent had filed the Insolvency Petition only to cheat the creditors after conveniently transferring the properties in the name of his own brother, viz. the 3rd respondent. According to his proof affidavit, it is stated that the sale deeds dated 05.03.2007 are not supported by consideration. It is also claimed that the sales are for a very nominal value and the sale deeds are thus not binding on the Official Assignee. In the Cross-examination he would admit that the front elevation of the building was demolished by the High ways Department for widening the road. He would further admit that the building has been demolished approximately 2 feet in the ground floor and 3 feet in the first floor. He would submit that March 2007 the market value of the land was about Rs.1200 per sq.ft., he has also got the property valued by an Engineer, who has examined as P.W.2 as already pointed out the said Engineer Mr.S.V.N.Natarajan had filed a report showing the valuation of the property as on 20.07.2007 at Rs.73,45,536. The said S.V.N.Natarajan had deposed that he does not know how many rooms, halls, verandas and toilets are there in the building. He has also admitted that a portion of the front elevation of the building has been demolished and that he has not stated about the demolition in his report. He would claim that the demolition will not affect the value of the property. P.W.2 the said Engineer has not spoken to about the payment of consideration or the absence of it for the sale deeds dated 05.03.2007.

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14. On the side of the Official Assignee one Sappanipillai an approved valuer has been engaged he has submitted a report showing the value of the property at Chennai Bangalore Trunk Road, Poonamallee of Rs.90,20,000/- and the property at Pillayar Koil Street, Poonamallee measuring about 258 sq. ft. at Rs.5,09,000/-. However the said Sappani Pillai has not tendered evidence and only his assistant was examined on his behalf. It is not in dispute that the property in question was subject to a mortgage with State Bank of India and the Bank had issued a possession notice under the *SARFAESI* Act, on 16.09.2006 and the same was published in 'Daily Thanthi' News paper on 24.09.2006. These facts are demonstrated by Ex.R9 and Ex.R10. It is seen from Exs.R17 and R18 that the 3rd respondent has paid a sum of Rs.39,50,000/- to State Bank of India for discharging the loan availed by the 1st respondent from the said Bank, the compromise settlement proposal made by the 1st respondent offering to pay a sum of Rs.39,50,000/- by way of one time settlement has been accepted by the Bank on 22.02.2007 as per the Ex.R.16. It is also seen from Exs.R9 and R10 that the Bank had issued possession notices, Ex.R12 dated 17.11.2006 would show that the Debt Recovery Tribunal I, Chennai had granted interim stay on condition that the 1st respondent should deposit a sum of Rs.4,00,000/- within a period of four weeks from 17.11.2006 and

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the said sum of Rs.4,00,000/- has been deposited by him with State Bank of India. It is also seen from the order of the Debt Recovery Tribunal dated 14.03.2007 marked as Ex.R21 that the Tribunal has recorded the payment of Rs.39,50,000/- by the 1st respondent to the Bank and disposed of the Securitization Application filed by the 1st respondent. The 3rd respondent has also produced Ex.R25, it is a notice under the Tamil Nadu High ways Act, 2001, seeking to acquire an extent of about 75 Sq.m. is equivalent to 807 Sq. ft. from the 3rd respondent in the property situate at Chennai Bangalore Trunk Road, Poonamalle. Therefore, as on today the land available in the property situate at Bangalore Road is only 725 Sq.ft., the 3rd respondent has also deposed that the acquisition has been implemented and the building has been demolished to a large extent. It is in the above circumstances it has to be determined as to whether the Official Assignee or the applicants in Application No.282 of 2007 have discharged the burden of proving that the sales effected by the 1st respondent in favour of the 3rd respondent are made without consideration and in lack of good faith.

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15. In the ***Official Assignee vs S.Arjunlal Sunderdas***, OSA Nos.214 to 219 of 2016, a Division Bench of this Hon'ble Court has stated the law on the point as follows:

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"5. The learned Single Judge, in the impugned order, has observed that the proper test to be applied is one whether inspite of the knowledge of the insolvency proceedings, an unfair purchase was made, and the onus was on the owner/purchaser to prove that it was in good faith."

"7. In our view, there can be no doubt about the test aforementioned....."

16. As per the guideline value on 05.03.2007 the value of the land of 1573 sq. ft. at Chennai Bangalore Trunk Road at Rs.900/- per sq. ft works out to Rs.14,15,700/- and it is admitted the fact that the building is about 77 years old and a portion of building is demolished for the purposes of road widening also it is also under such circumstances the 3rd respondent had purchased the property for a consideration of Rs.45,00,000/- under the sale deed dated 05.03.2007. The other property, viz. the property at Pillayar Koil Street, measures only 258 sq. ft. and it is stated that it is a car shed, the value of the land of the said property as per the guideline value at Rs.900/- works out to Rs.2,50,200/-. It is seen that the said property is situate in a narrow street and measures only 258 sq. ft., therefore, the property is incapable of any commercial or residential utilization and can be used only as a car shed as it is being used at present. Therefore, I do not think the basis on which the Engineers engaged by the Official Assignee as well as the applicants in Application No.282 of 2007 had proceeded to value the

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property would reflect a fair and reasonable valuation of both the properties. The fact that the sale deeds are supported by consideration cannot be doubted. In as much as the 3rd respondent has produced proof of payment of nearly Rs.43,50,000/- to the Bank, comprising of sum of Rs.4,00,000/- paid pursuant to the conditional order passed by the Debt Recovery Tribunal, Chennai, and Rs.39,50,000/- paid at the time of execution of the sale deed dated 05.03.2007. Insofar as the sale deed that relates to the property in Pillayar Koil Street, Poonamallee, it is seen that the same has been sold for Rs.1,00,000/-. The sale deed also recites that a sum of Rs.1,00,000/- has been paid in cash by the 3rd respondent to the 1st respondent. The sale deed also recites that the sale is made in order to discharge the debt due to the Bank. In the light of the above, unimpeachable evidence regarding the payment of sale consideration, it has to be necessarily concluded both the sale deeds are supported by consideration.

17. It remains to be seen as to whether the 3rd respondent could be said to be a *bona fide* purchaser, I have already extracted Section 55 of the Presidency Towns Insolvency Act, Section 57 of the said Act reads as follows:

57.**Protection of bona fide transactions**.- Subject to the

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foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency--

(a) any payment by the insolvent to any of his creditors;

(b) any payment or delivery to the insolvent;

(c) any transfer by the insolvent for valuable consideration; or

(d) any contract or dealing by or with the insolvent for valuable consideration;

Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.

18. A combined reading of the Sections 57 and 58 of the Act, makes it very clear that the Official Assignee or the person who challenges the sale should establish two things, viz.

1. The transfer is not for consideration and

2. The purchaser had notice of the presentation of the Insolvency petition or the indigent circumstances under which the debtor was placed at the time of the sale.

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19. There is nothing on record to suggest that the 3rd respondent was aware of the actual financial status of the 1st respondent. Of course, both Mr.V.Karthikeyan learned counsel appearing for the applicants in Application No.282 of 2007 and Mr.C.Ramesh, learned counsel appearing for the Official Assignee would point out certain discrepancies in the evidence of the 3rd respondent as R.W.2 and contend that knowledge of the indigent circumstances of the 1st respondent could be attributed to the 3rd respondent. A careful reading of the oral evidence of the 3rd respondent would show that he was not aware of the actual financial status. Of course, he had at one point of time deposed that he was not in talking terms with his brother right from 1988, when the partition took place between him and the 1st respondent. But, I do not think the effect of such admissions or such extreme stands taken by the parties at the time of letting in oral evidence would impute knowledge of the financial status of the 1st respondent on the 3rd respondent.

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20. As rightly contended by Mr.R.Munusamy, learned counsel appearing for the 3rd respondent, the Division Bench of this Court Judgment dated 26.10.2016 rendered in OS Appeals No.214 to 219 of 2016 has up held the sale deed on the ground that it was made for a value above the

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guideline value. In the present case also it could be seen that the sale deeds marked as Exs.P1 and P2 respectively or for higher value than the guideline value of the properties in question. The subsequent events that had taken place should also be taken note of. Though, the 3rd respondent had purchase an extent of 1573 sq. ft. from the 1st respondent, it is seen from the show cause notice marked as Ex.R13 dated 20.11.2006, an extent of about 33 sq.m equivalent to about 355 sq. ft. has been shown as encroachment and a further extent of about 805 sq. ft has been acquired by the Government for expansion of the road. Therefore, it is only less than half of the extent purchased by the 3rd respondent, i.e., available with him as on date. The fact that the sale deed dated 05.03.2007, insofar as it relates to the property situate at Chennai Bangalore Trunk Road is supported by consideration cannot be denied. As almost the entire consideration has been paid to State Bank of India in discharge of the loan availed by the 1st respondent on the strength of the mortgage of the said property.

21. In the light of the above, I am of the considered opinion that neither the Official Assignee nor the applicants in Application No.282 of 2007 have discharged the burden that lies on them to show that the 3rd respondent is not a *bona fide* purchaser for consideration. Hence, the Application No.282 of 2007 is dismissed. Holding that the Official Assignee

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is not entitled to have the sale deeds dated 05.03.2007 set aside under Section 55 of the Presidency Towns Insolvency Act. However, in the circumstances of the case, there shall be no order as to costs.

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Index: Yes/No
Internet: Yes/No
Speaking order/Non speaking order
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R.SUBRAMANIAN,J.

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Pre Delivery Order

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